

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JASON A. PEREZ-MORCIGLIO and
SEBASTIAN PEREZ-MORCIGLIO,

Plaintiffs,

v.

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT; SHERIFF DOUGLAS
GILLESPIE; SERGEANT KENDALL
BELL; OFFICER T. SCOTT; OFFICER S.
SCHAIER; LAS VEGAS SANDS
CORPORATION; VENETIAN CASINO
RESORT, LLC; ELI CASTRO; LINDA
HAGENMAIER; RON HICKS;
WILLIAM LOVEGREN; ANTHONY
BRONSON; KEVIN NEANOVER; KIM
GORMAN; PAUL TANNER; and TONY
WHIDDON,

Defendants.

2:10-CV-00899-PMP-RJJ

ORDER

Presently before the Court is Defendants Las Vegas Sands Corp.; Venetian Casino Resort, LLC; Eli Castro; Linda Hagenmaier; William Lovegren; Anthony Bronson; Kevin Neanover; Kim Gorman; Paul Tanner; and Tony Whiddon's ("Venetian Defendants") Motion for Summary Judgment (Doc. #80), filed on May 23, 2011. Plaintiffs filed an Opposition and Counter-Motion for Summary Judgment (Doc. #95) on June 17, 2011. Venetian Defendants filed a Reply (Doc. #103) on July 12, 2011. The Court held a hearing on these motions on September 27, 2011. (Mins. of Proceedings (Doc. #118).)

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I. BACKGROUND

Plaintiff Jason Perez-Morciglio (“Jason”) is a street performer who dresses up as a masked bandit like Zorro and performs as this character on the sidewalks along the Las Vegas Strip. (Venetian Defs.’ Mot. Summ. J. (Doc. #80) [“VMSJ”], Ex. 3 at 1.) When he performs, he applies his knowledge from theater and dancing, and uses his “artistic charm” to entertain tourists and locals. (LVMPD Defs.’ Mot. Summ. J. (Doc. #81) [“LVMPD MSJ”], Ex. A at 12.) Jason has been performing as Zorro on the Las Vegas Strip since January 2010, and previously did so on Hollywood Boulevard for over seven years. (VMSJ, Ex. 3 at 1.) Jason avers that when he is performing, he does not ask people for money, but he will accept tips if offered to him. (Id.) Jason carries plastic swords and knives with him so he can do play sword fights with audience members, or to use as props when posing in pictures with tourists, but he denies selling anything. (Id.; LVMPD MSJ, Ex. A at 15.) Plaintiff Sebastian Perez-Morciglio (“Sebastian”) is Jason’s brother, and also a street performer who performs as Darth Vader. (VMSJ, Ex. 6 at 1.)

On Friday, January 15, 2010, Jason was dressed up as Zorro and went to the Las Vegas Strip to perform. (Id.) Sebastian was with his brother, but was not dressed as any character. (Id.) Plaintiffs were passing the Venetian to get to the Paris or Bellagio hotels. (VMSJ, Ex. 4 at 125.) Jason was near the fence between the sidewalk and Las Vegas Boulevard. (VMSJ, Ex. 3 at 1; Notice of Manual Filing (Doc. #82).) Sebastian paused at the fence to watch the Mirage Hotel volcano show taking place across the street. (VMSJ, Ex. 6 at 1; Notice of Manual Filing.) Jason walked up to a trash can to throw away a tissue when Defendant William Lovegren (“Lovegren”), a private security guard with the Venetian, approached him. (VMSJ, Ex. 3 at 1; Notice of Manual Filing.)

Jason and Lovegren dispute what occurred during their initial encounter. According to Lovegren, he observed Jason from a distance of approximately fifty to sixty feet give a sword to a tourist, and the tourist gave Jason money. (VMSJ, Ex. 10 at 43-44.)

1 Although Lovegren could not hear any conversation between Jason and the tourist,
2 Lovegren concluded that Jason had solicited the tourist to purchase the sword. (Id. at 44-
3 45.) According to Lovegren, he then approached Jason and told Jason soliciting was not
4 permitted on the property. (Id. at 49.) Jason responded that Lovegren was violating his
5 First and Fourteenth Amendment rights. (Id. at 50.)

6 Jason denies that he sold anything prior to the time Lovegren approached him.
7 (VMSJ, Ex 4 at 124.) According to Jason, Lovegren told him that he was on private
8 property and had to leave immediately. (VMSJ, Ex. 3 at 1.) Jason told Lovegren he was on
9 a public sidewalk, and thus was not trespassing; Lovegren was violating his constitutional
10 rights; and Lovegren should call the police if Lovegren truly believed Jason was
11 trespassing. (VMSJ, Ex. 3 at 2.) When Jason would not leave, Lovegren's supervisor,
12 Defendant Anthony Bronson ("Bronson"), advised Lovegren via the radio to trespass Jason
13 by reading him Nevada Revised Statutes § 207.200 and by telling Jason that he was being
14 trespassed for soliciting, and Lovegren did so. (Id., Ex. 10 at 53-55, 62-64.) Bronson
15 acknowledges that soliciting is not illegal, but asserts it is a violation of an unwritten
16 Venetian policy, and that policy applies to the sidewalk in front of the Venetian. (Decl. of
17 Margaret A. McLetchie in Supp. of Pls.' Opp'n to Mot. Summ. J. of Venetian Defs. (Doc.
18 #93) ["Opp'n to VMSJ"], Ex. 1 at 44, 81.)

19 Both Jason and Lovegren agree that Lovegren asked Jason to leave and read him
20 the trespass card several times, but Jason refused to leave and continued to assert his right
21 to be on the sidewalk. (VMSJ, Ex. 4 at 146, Ex. 10 at 54-56.) According to Lovegren, he
22 told Jason that the Venetian owned the property up to the curb, and although there is a
23 public walk-through, Jason could not solicit in that area. (VMSJ, Ex. 10 at 56.)

24 Four more Venetian security guards, Defendants Linda Hagenmaier
25 ("Hagenmaier"), Ron Hicks ("Hicks"), Eli Castro ("Castro"), and Kevin Neanover
26 ("Neanover"), then arrived on the scene. (VMSJ, Ex. 3 at 1.) According to Lovegren, after

1 he had read Jason the trespass statute three times and Jason still refused to leave, Bronson
2 told Lovegren to bring Jason to the back of the hotel. (VMSJ, Ex. 10 at 58-60.) Jason
3 states that after he told the security guards to call the police, they placed him in handcuffs.
4 (VMSJ, Ex. 3 at 1.) Although there is some dispute in the record as to who made the
5 decision to place Jason in handcuffs,¹ Lovegren and Castro put Jason in handcuffs. (VMSJ,
6 Ex. 10 at 61; Notice of Manual Filing.)

7 As the security guards were placing Jason in handcuffs, Sebastian approached
8 Hagenmaier and asked what Jason had done wrong. (VMSJ, Ex. 3 at 1, Ex. 6 at 1.)
9 Sebastian had a cigarette in one hand and a soda bottle in the other hand. (Opp'n to VMSJ,
10 Ex. 4 at 63.) Hagenmaier told Sebastian to leave or she would arrest him, but he did not
11 leave, instead he asked her why she did not call the police. (VMSJ, Ex. 3 at 1, Ex. 6 at 4,
12 Ex. 7 at 25; Opp'n to VMSJ, Ex. 1 at 60.) Hagenmaier and Neanover then placed Sebastian
13 in handcuffs as well. (VMSJ, Ex. 3 at 1, Ex. 6 at 4, Ex. 7 at 25; Opp'n to VMSJ, Ex. 1 at
14 60; Notice of Manual Filing.)

15 The security guards walked Jason and Sebastian across Venetian property and
16 into the Venetian casino security office holding area. (VMSJ, Ex. 3 at 2; Notice of Manual
17 Filing.) In the office, Jason continued to tell the officers that he had done nothing wrong
18 and they were violating his First and Fourteenth Amendment constitutional rights. (VMSJ,
19 Ex. 3 at 2-3.) Lovegren searched Jason, removed objects from his bag, and asked Jason for
20 his identification. (Id.) Jason avers he refused to give his identification, and demanded to
21 talk to a police officer and an attorney. (Id.) After searching him, the security guards
22 fastened Jason to a bench with a seatbelt while he was still in handcuffs. (Id.; Notice of
23 Manual Filing.) Sebastian also was searched and left in handcuffs. (Opp'n to VMSJ, Ex. 24

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25 ¹ According to Lovegren, either Bronson or Hagenmaier told Lovegren to put Jason in
26 handcuffs. (VMSJ, Ex. 10 at 60-65.) According to Bronson, Lovegren was the person who decided
to place Jason in restraints. (Opp'n to VMSJ, Ex. 1 at 37.)

1 at 2; Notice of Manual Filing.)

2 Approximately twenty minutes after the security guards brought Jason and
3 Sebastian to the holding area, two LVMPD officers, Defendants Scott Schaier (“Schaier”)
4 and Terry Scott (“Scott”), arrived. (Notice of Manual Filing.) Schaier took off the
5 Venetian’s handcuffs and put his own handcuffs on Jason. (Id.; VMSJ, Ex. 3 at 3.) Schaier
6 requested Jason’s consent to search Jason’s satchel, and Jason consented, but indicated the
7 Venetian security officers did not request a consent to search him. (Notice of Manual
8 Filing.) According to Jason, Schaier responded that the security guards could “do whatever
9 they wanted because [Plaintiffs] were on private property.” (VMSJ, Ex. 3 at 3; see also
10 Notice of Manual Filing.)

11 Scott subsequently advised Jason and Sebastian that the police were not going to
12 arrest them, but that the officers were going to give them a trespass warning to sign.²
13 (VMSJ, Ex. 3 at 3-4.) Sebastian did not want to sign the warning because it said he was
14 trespassing on private property and Sebastian believed that was not true. (VMSJ, Ex. 7 at
15 30.) However, Sebastian eventually signed the warning. (Id.)

16 Jason refused to sign the warning because he contended he was on a public
17 sidewalk and he believed he had not been trespassing. (VMSJ, Ex. 3 at 4.) Schaier told
18 Jason that if he did not sign the warning, Schaier would take him to jail and he could talk to
19 a judge about it. (Id.) Scott then called Schaier away, and when they returned to the
20 holding room, Schaier removed the handcuffs and told Jason to sit with his hands above his
21 head. (Id.) The officers did not require Jason to sign the warning, but advised him that it

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23 ² Plaintiffs have presented evidence that the misdemeanor warning was issued in violation of
24 LVMPD policy. Defendant Sheriff Douglas Gillespie testified that the misdemeanor warning should
25 not have been given in the case of a trespass warning because no offense had been committed. (Opp’n
26 to LVMPD Defs.’ Mot. Summ. J. (Doc. #105), Ex. 3 at 81-82.) LVMPD policy provides that a
misdemeanor warning should be given only for misdemeanor offenses committed in the officers’
presence. (Id., Ex. 27 at 554.)

1 did not matter if he refused to sign, he still was not welcome on the Venetian's property.

2 (Notice of Manual Filing.)

3 Venetian security officers re-read trespass cards to Plaintiffs. (VMSJ, Ex. 3 at 4.)
4 The security officers also advised Plaintiffs not to come back to the Venetian or the Palazzo
5 or they would be arrested. (Id.) When asked whether Plaintiffs could use the public
6 sidewalk in front of the property, the security officers responded that Plaintiffs could use
7 the sidewalk to pass in front of the property, but if they stopped they would be arrested. (Id.
8 at 5.) However, in Bronson's opinion, Plaintiffs would be trespassing if they came back to
9 the sidewalk. (Opp'n to VMSJ, Ex. 1 at 88.) The security officers then escorted Plaintiffs
10 out of the casino. (Id.)

11 Plaintiffs aver that following this incident they were afraid to go back to the
12 sidewalk in front of the Venetian for fear of being arrested. (VMSJ, Ex. 3 at 5, Ex. 7 at 46,
13 103.) Plaintiffs state they purchased a vehicle so they would not have to pass in front of the
14 Venetian on foot again. (VMSJ, Ex. 7 at 46.)

15 Based on this incident, Plaintiffs filed suit in this Court, asserting claims against
16 Venetian Defendants for violation of Plaintiffs' First Amendment rights (count one);
17 violation of Plaintiffs' Fourth Amendment rights against unlawful arrest (count two);
18 violation of Plaintiffs' Fourth Amendment rights to be free from unreasonable searches
19 (count three); violation of Plaintiffs' Fourth Amendment right to be free from unlawful
20 detention (count four); civil conspiracy (count five); violations of Plaintiffs' substantive due
21 process rights under the Fourteenth Amendment (count six); false imprisonment (count
22 eight); battery (count nine); intentional infliction of emotional distress (count ten); negligent
23 infliction of emotional distress (count eleven); and negligent training, supervision, and
24 retention against the Venetian only (count twelve). (Fourth Am. Compl. (Doc. #59).)
25 Venetian Defendants now move for summary judgment on all claims against them.
26 Plaintiffs oppose and counter-move for summary judgment.

II. DISCUSSION

Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a), (c). A fact is “material” if it might affect the outcome of a suit, as determined by the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is “genuine” if sufficient evidence exists such that a reasonable fact finder could find for the non-moving party. Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002). Initially, the moving party bears the burden of proving there is no genuine issue of material fact. Leisek v. Brightwood Corp., 278 F.3d 895, 898 (9th Cir. 2002). After the moving party meets its burden, the burden shifts to the non-moving party to produce evidence that a genuine issue of material fact remains for trial. Id. The Court views all evidence in the light most favorable to the non-moving party. Id.

A. Section 1983 Constitutional Claims - Counts One to Six

Venetian Defendants move for summary judgment on Plaintiffs’ § 1983 constitutional claims against them because Venetian Defendants are not state actors. Plaintiffs respond by arguing Venetian Defendants acted under color of state law because they performed the inherently public function of regulating a public forum by policing the public sidewalk in front of the Venetian. Alternatively, Plaintiffs argue Venetian Defendants engaged in joint action or conspired with state actors in regulating the sidewalk.

“To state a claim under [42 U.S.C.] § 1983, the plaintiff must allege a violation of his constitutional rights and show that the defendant’s actions were taken under color of state law.” Gritchen v. Collier, 254 F.3d 807, 812 (9th Cir. 2001). A defendant acts under color of law if he “exercise[s] power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” West v. Atkins, 487 U.S. 42, 49 (1988) (quotation omitted). “Action under color of state law normally consists

1 of action taken by a public agency or officer.” Taylor v. First Wyo. Bank, N.A., 707 F.2d
2 388, 389 (9th Cir. 1983).

3 However, under some circumstances, private individuals may be liable as
4 governmental actors. See Kirtley v. Rainey, 326 F.3d 1088, 1092 (9th Cir. 2003); Morse v.
5 N. Coast Opportunities, Inc., 118 F.3d 1338, 1340 (9th Cir. 1997). Conduct by a private
6 individual constitutes state action when (1) the claimed deprivation “‘resulted from the
7 exercise of a right or privilege having its source in state authority,’” and (2) under the facts
8 of the particular case, the private party appropriately may be characterized as a state actor.
9 Villegas v. Gilroy Garlic Festival Ass’n, 541 F.3d 950, 955 (9th Cir. 2008) (quoting Lugar
10 v. Edmondson Oil Co., Inc., 457 U.S. 922, 939 (1982)).

11 The courts have identified several tests to determine whether a private entity acts
12 under the color of state law, including when the private entity engages in conduct that is
13 traditionally exclusively reserved to the State (“Public Function Test”) or when the private
14 entity acts jointly with the State (“Joint Action Test”). Johnson v. Knowles, 113 F.3d 1114,
15 1118 (9th Cir. 1997). Although these tests and other such tests are helpful in determining
16 state involvement, “‘there is no specific formula for defining state action.’” Sutton v.
17 Providence St. Joseph Med. Ctr., 192 F.3d 826, 836 (9th Cir. 1999) (quoting Howerton v.
18 Gabica, 708 F.2d 380, 383 (9th Cir. 1983) (quotation omitted)). Rather, a court should look
19 to whether a sufficiently close nexus between the state and the challenged conduct exists to
20 fairly attribute the conduct to the state. Id. The inquiry is fact specific. Id. The Court
21 begins with the presumption that private conduct does not constitute governmental action.
22 Id. at 835.

23 1. Public Function Test

24 Under the public function test, a private actor performs a public function if his
25 activities traditionally have been the State’s exclusive prerogative. Brunette v. Humane
26 Soc’y of Ventura Cnty., 294 F.3d 1205, 1214 (9th Cir. 2002). For example, holding

1 elections, governing a town, or serving as an international peacekeeping force are
2 traditionally exclusively the State's prerogative, and a private actor engaged in such
3 activities will be held to be a state actor. Id.

4 The United States Court of Appeals for the Ninth Circuit has addressed the issue
5 of whether a private actor becomes a state actor by performing the traditional state function
6 of operating a public forum. For example, in Lee v. Katz, the Ninth Circuit stated that by
7 "regulating free speech" in a public forum, a private actor "performs an exclusively and
8 traditionally public function within a public forum." 276 F.3d 550, 554 (9th Cir. 2002).
9 However, in Lee, the Ninth Circuit stated that "the [private actor] became a State actor
10 when the City delegated . . . regulation [of a public forum] to the [private actor]." Id. at 556
11 & n.6 (noting that the lease required the private actor to allow free speech on the Commons
12 as required by law). The Ninth Circuit specifically noted that a private actor does not
13 become a state actor "when the State maintains the ultimate power to regulate activities in
14 the forum." Id. at 556.

15 Following on that premise, the Ninth Circuit held that a festival organizer does
16 not become a state actor merely because it reserves public property, such as a park or streets
17 and sidewalks, to conduct its activities. Villegas, 541 F.3d at 955-56. Critical to this
18 holding was the fact that the private actor needed a permit to operate the festival, thereby
19 "showing that the City retained control of the park and provided security services." Id. at
20 956.

21 The state actor inquiry is focused on whether the source of the private actor's
22 power comes from the State. Lugar, 457 U.S. at 937 (explaining that to show state action,
23 "the deprivation must be caused by the exercise of some right or privilege created by the
24 State or by a rule of conduct imposed by the state or by a person for whom the State is
25 responsible"). If the private actor is merely claiming power derived from the State with no
26 actual delegation or abdication by the State, the private actor's mere attempts to perform

1 traditional public functions do not suffice to make the private actor a state actor. In Lee, the
2 State delegated the power to control a public forum to the private actor, whereas in Villegas
3 the city specifically declined to delegate its authority, leading to the conclusion that the
4 festival organizer was not a state actor.

5 Here, there is no question that the sidewalk in front of the Venetian is a
6 traditional public forum, as this Court and the Ninth Circuit already made this determination
7 ten years ago. Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd. of Las Vegas, 257
8 F.3d 937, 948 (9th Cir. 2001) (holding “the Venetian’s sidewalk constitutes a public forum
9 subject to the protections of the First Amendment”); Venetian Casino Resort, L.L.C. v.
10 Local Joint Exec. Bd. of Las Vegas, 45 F. Supp. 2d 1027, 1036 (D. Nev. 1999) (“The public
11 may use the Venetian’s sidewalk for First Amendment purposes to the same degree that it
12 may use any other public sidewalk subject to content neutral and reasonable time, place, and
13 manner restrictions”); see also Am. Civil Liberties Union of Nev. v. City of Las Vegas, 333
14 F.3d 1092, 1099 (9th Cir. 2003) (“The quintessential traditional public forums are
15 sidewalks, streets, and parks.”). Consequently, the only question here is whether Venetian,
16 by attempting to police what activity may occur on the sidewalk, is performing a public
17 function.

18 In the prior Venetian case, this Court stated that “by owning and maintaining the
19 particular sidewalk at issue in this case, the Venetian is performing a public function.” 45
20 F. Supp. 2d at 1035. However, the Court was not tasked in that case with deciding whether
21 Venetian was a state actor. While operating and policing a public forum is traditionally
22 exclusively a public function, this case is more like Villegas than Lee, and the Venetian
23 Defendants are not state actors as a matter of law. There is no evidence the State or County
24 have delegated, either expressly or by acquiescence, any authority to the Venetian to
25 regulate the public sidewalk. Rather, the evidence is to the contrary. For example, the prior
26 litigation involving the Venetian’s sidewalk resulted from a union seeking a protest permit

1 from the County, which the County granted. Venetian Casino Resort, L.L.C., 45 F. Supp.
2 2d at 1031. When the Venetian warned the protesters they were on private property and
3 must leave, the LVMPD consulted with the district attorney and refused to make any
4 arrests. Id. Consequently, the governmental authorities asserted the power to control the
5 sidewalk, both through the permitting process and through the decision about whether to
6 make arrests on the sidewalk.

7 The facts of the instant case likewise support this conclusion. The Venetian
8 Defendants took Plaintiffs into their custody, but when LVMPD officers arrived, the police
9 officers refused to make an arrest. Additionally, evidence in the record shows that LVMPD
10 has taken the position that it will not enforce the trespass law on the public sidewalk in front
11 of casinos on the Strip without a court order. (LVMPD MSJ, Ex. H; Opp'n to LVMPD
12 MSJ, Exs. 17, 18.) Consequently, Venetian Defendants do not have any authority deriving
13 from the State to police the public forum on the Venetian's private property. The Venetian
14 Defendants therefore are not state actors under the public function test as a matter of law.

15 2. Joint Action Test

16 "To be engaged in joint action, a private party must be a willful participant with
17 the State or its agents in an activity which deprives others of constitutional rights."
18 Brunette, 294 F.3d at 1211. The joint action test is satisfied if "the state has so far
19 insinuated itself into a position of interdependence with the private entity that it must be
20 recognized as a joint participant in the challenged activity. This occurs when the state
21 knowingly accepts the benefits derived from unconstitutional behavior." Kirtley, 326 F.3d
22 at 1093 (quotation omitted). There must be a "substantial degree of cooperation" between
23 the private actor and the state to support finding a private actor jointly acted with the state.
24 Franklin v. Fox, 312 F.3d 423, 445 (9th Cir. 2002).

25 If a plaintiff can show the police condoned a private party's activity that the
26 police knew to be illegal, a question of fact will exist as to whether the private party and the

1 state actors acted jointly. Peng v. Mei Chin Penghu, 335 F.3d 970, 980 (9th Cir. 2003)
2 (citing Soldal v. Cook Cnty., 506 U.S. 56, 58-60 & n.6 (1992)). Alternatively, if the
3 plaintiff can show the police substantially cooperated with the private actor on multiple
4 occasions, that may suffice to support state action. Howerton, 708 F.2d at 381. However,
5 merely complaining to the police or the police standing by to keep the peace do not amount
6 to joint action. Peng, 335 F.3d at 980 (A “single request to the police, without more, [is]
7 not sufficient to establish a claim against a private actor pursuant to § 1983.”); Collins v.
8 Womancare, 878 F.2d 1145, 1155-56 (9th Cir. 1989).

9 Here, there is no evidence raising a genuine issue of material fact that Scott and
10 Schaier knew Venetian Defendants were engaging in illegal conduct. Scott and Schaier
11 indicated they did not know where Plaintiffs were located at the time Venetian Defendants
12 intercepted them, and therefore Scott and Schaier did not know whether Venetian
13 Defendants properly were asserting Plaintiffs were on private property. Scott and Schaier
14 testified in their depositions they thought it was a gray area as to the competing legal rights
15 on the sidewalk, and where the boundary line was between public and private property at
16 the Venetian. (LVMPD MSJ, Ex. C at 67-68, Ex. D at 49-51.) Because Scott and Schaier
17 were not sure whether Venetian Defendants properly trespassed Plaintiffs from private
18 property, they did not know Venetian Defendants’ conduct was illegal and therefore Scott
19 and Schaier did not condone illegal conduct.

20 Additionally, no genuine issue of material fact remains that Venetian Defendants
21 are not state actors under the joint action test by virtue of their interaction with the police
22 officers. A single instance of police officers standing by to keep the peace while Venetian
23 Defendants read the trespass warning to Plaintiffs does not amount to joint action. Venetian
24 Defendants effected the citizen’s arrests prior to the police officers’ arrival, and Plaintiffs
25 were taken into custody solely at the impetus of the private actors. When Scott and Schaier
26 arrived and talked to the security personnel and Plaintiffs, they refused to arrest Plaintiffs.

1 There is no evidence of a prearrangement between Scott, Schaier, and the Venetian security
2 guards. Venetian Defendants are not state actors under the joint action test as a matter of
3 law.

4 3. Joint Action Test - Conspiracy

5 “A conspiracy between the State and a private party to violate another’s
6 constitutional rights may also satisfy the joint action test.” Brunette, 294 F.3d at 1211. To
7 establish a conspiracy, the plaintiff must show “an agreement or meeting of the minds to
8 violate constitutional rights.” Crowe v. Cnty. of San Diego, 608 F.3d 406, 440 (9th Cir.
9 2010) (quotation omitted). “To be liable as co-conspirators, each participant in a conspiracy
10 need not know the exact details of the plan, but each participant must at least share the
11 common objective of the conspiracy.” Franklin, 312 F.3d at 445. The alleged
12 co-conspirators therefore must share “the goal of violating a plaintiff’s constitutional
13 rights.” Id.

14 Plaintiffs have failed to present evidence raising a genuine issue of material fact
15 that there was a meeting of the minds to violate Plaintiffs’ constitutional rights. Venetian
16 Defendants made the decision to remove Plaintiffs from the sidewalk and to detain them
17 without any participation by the police officers. When Scott and Schaier arrived, they
18 declined to arrest Plaintiffs despite Venetian Defendants’ request they do so. Plaintiffs
19 present no evidence Scott or Schaier acted with the goal of violating Plaintiffs’
20 constitutional rights. Scott testified that he was called out to the Venetian in a similar
21 incident, determined the individual who allegedly was trespassing was on the public
22 sidewalk, and advised the Venetian security officer that he would not be taking any law
23 enforcement action. (LVMPD MSJ, Ex. C at 42-43.) There is no evidence raising a
24 genuine issue of material fact that LVMPD police officers generally, or Scott and Schaier in
25 particular, had a meeting of the minds with the Venetian security guards to violate the
26 constitutional rights of street performers generally or Plaintiffs specifically.

1 Venetian Defendants are not state actors as a matter of law under any theory.
2 The Court therefore will grant summary judgment in favor of Venetian Defendants and will
3 deny Plaintiffs' Counter-Motion on all of Plaintiffs' § 1983 constitutional claims.

4 **B. State Law Tort Claims - Counts Eight to Twelve**

5 Venetian Defendants assert that Nevada Revised Statutes § 651.020 permits them
6 to use force to eject trespassers from their property and their conduct therefore was
7 privileged. Venetian Defendants also move for summary judgment on the emotional
8 distress claims, arguing there is no evidence of emotional distress or outrageous conduct.

9 Plaintiffs respond by agreeing to voluntarily dismiss the emotional distress
10 claims. (Opp'n to VMSJ at 10 n.3.) As to the other state law claims, Plaintiffs argue
11 Venetian Defendants have no right to eject members of the public from a traditional public
12 forum. Plaintiffs also contend that even if Venetian Defendants have the rights they claim,
13 issues of fact would remain as to whether Defendants used excessive force to evict
14 Plaintiffs from the sidewalk.

15 This Court and the Ninth Circuit already have ruled that the sidewalk in front of
16 the Venetian is a public sidewalk and Venetian Defendants have no right to exclude
17 members of the public from the public sidewalk. This Court specifically stated that "[s]ince
18 the sidewalk performs an essential public function, the Venetian does not have the right to
19 exclude individuals from the sidewalk based upon permissible exercises of their right to
20 expression under the First Amendment." Venetian Casino Resort, L.L.C., 45 F. Supp. 2d at
21 1036. The Ninth Circuit echoed this sentiment: "Property that is dedicated to public use is
22 no longer truly private. Although the owner of the property retains title, by dedicating the
23 property to public use, the owner has given over to the State or to the public generally one
24 of the most essential sticks in the bundle of rights that are commonly characterized as
25 property, the right to exclude others." Venetian Casino Resort, L.L.C., 257 F.3d at 945-46
26 (quotation omitted). Venetian Defendants have dedicated the sidewalk in front of the

1 Venetian to public use, and that sidewalk is a traditional public forum from which the
2 Venetian Defendants have no right to exclude Plaintiffs. Id. at 946.

3 Venetian Defendants rely on cases holding the government may exclude
4 members of the public from non-public forums. But those cases have no application here
5 because the sidewalk in front of the Venetian is a traditional public forum. Compare
6 Venetian Casino Resort, L.L.C., 257 F.3d at 948 (“As a thoroughfare sidewalk, seamlessly
7 connected to public sidewalks at either end and intended for general public use, the
8 sidewalk in front of the Venetian is the archetype of a traditional public forum.” (quotation
9 omitted)), with United States v. Kokinda, 497 U.S. 720, 727-30 (1990) (holding a sidewalk
10 leading from the public sidewalk to a post office was a non-public forum and the
11 government therefore could forbid individuals from setting up tables and passing out
12 literature on the non-public forum sidewalk); Adderley v. State of Fla., 385 U.S. 39, 41
13 (1966) (holding that demonstrators at a jail trespassed based on finding that the jail was not
14 open to the public, that is, it was not a traditional public forum).

15 Finally, Venetian Defendants argue that under Nevada state law, they legally are
16 required to police a public sidewalk that traverses their private property, and therefore they
17 have the concomitant right to exclude members of the public from that sidewalk for conduct
18 which violates Venetian’s private unwritten policies. The cases upon which Venetian
19 Defendants rely do not support their position. In Herndon v. Arco Petroleum Co., the
20 Nevada Supreme Court held that where a private property owner makes “special use” of a
21 public sidewalk that traverses private property, the private property owner may be liable in
22 negligence if that special use creates a hazard. 536 P.2d 1023, 1024-25 (Nev. 1975); see
23 also Wiseman v. Hallahan, 945 P.2d 945, 946 (Nev. 1997) (reaffirming Nevada’s adoption
24 of the rule that “abutting property owner or occupant is under no duty to keep the sidewalk
25 in front of his property in a reasonably safe condition” (quotation omitted)). Herndon does
26 not purport to authorize or require private land owners to police public sidewalks traversing

1 their private property or to grant private property owners the power to eject members of the
2 public from public sidewalks traversing private property.

3 This Court and the Ninth Circuit made clear ten years ago that as “a thoroughfare
4 sidewalk, seamlessly connected to public sidewalks at either end and intended for general
5 public use,” the sidewalk in front of the Venetian is a public sidewalk, and consequently, a
6 traditional public forum from which Venetian Defendants have no right to exclude members
7 of the public. Venetian Casino Resort, L.L.C., 257 F.3d at 948. The Court therefore will
8 deny Venetian Defendants’ Motion for Summary Judgment on the state law claims.

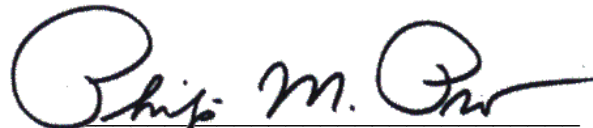
9 The Court will not consider Plaintiffs’ Counter-Motion. Plaintiffs did not timely
10 file the motion, this Court previously denied Plaintiffs’ request to extend the dispositive
11 motion deadline (Doc. #79), and Plaintiffs filed the Counter-Motion without leave of the
12 Court.

13 **III. CONCLUSION**

14 IT IS THEREFORE ORDERED that Defendants Las Vegas Sands Corp.;
15 Venetian Casino Resort, LLC; Eli Castro, Linda Hagenmaier; William Lovegren; Anthony
16 Bronson; Kevin Neanover; Kim Gorman; Paul Tanner; and Tony Whiddon’s Motion for
17 Summary Judgment (Doc. #80) is hereby GRANTED in part and DENIED in part. The
18 motion is granted with respect to Plaintiffs’ constitutional claims in counts one through six.
19 The motion is denied in all other respects.

20 IT IS FURTHER ORDERED that Plaintiffs’ Counter-Motion for Summary
21 Judgment (Doc. #95) is hereby DENIED.

22
23 DATED: October 25, 2011

24 
25 PHILIP M. PRO
26 United States District Judge